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December 21, 2004

By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Supplement to Pending Consolidated Requests for Review of Decisions of the
Universal Service Administrator
CC Docket No. 02-6

Dear Ms. Dortch:

Between July and August 2004, fourteen Louisiana parish school districts (the “Schools”),¹ through counsel, sought Commission review of a series of funding denials by the Administrator of the Universal Service Administrative Company (“USAC”). USAC denied the Schools’ Year 2002-2003 funding requests due to alleged violations of Title 38 of the Louisiana Revised Statutes (state procurement law), as that law was interpreted by USAC. A list of the Schools’ pending Requests for Review (“Requests”) is attached hereto as Attachment A. The Schools asked in their filings that the Commission consolidate the Requests because they raise substantially identical issues.

Since compliance with state procurement requirements is a matter of state law, the Schools’ counsel, who is also counsel for the Louisiana School Boards Association, sought an opinion from the Louisiana Attorney General (“AG”) regarding the applicability of Title 38 to

¹ The Schools include the school districts or boards of DeSoto, Tensas, Bienville, Madison, Caldwell, Catahoula, Claiborne, Concordia, Franklin, Lincoln, Webster, Winn, Morehouse and Richland Parishes.

the Schools' purchase of Internet access services and internal connections through the E-rate Program. Counsel requested the FCC to hold in abeyance consideration of the Requests pending receipt of the AG's opinion. The Schools hereby supplement their Requests with an opinion issued by the AG (see Attachment B) that addresses the applicability of the state procurement law to the Schools' purchase of Internet access services and internal connections through the E-rate Program. As discussed below, the AG opinion indicates that the Schools did not violate state procurement law, and thus they also did not violate the E-rate Program's competitive bidding requirements, when they sought bids for and purchased Internet access services and internal connections.

As explained in the Requests, USAC's Schools and Libraries Division ("SLD") initially denied the Schools' funding requests because, according to the SLD's interpretation of Louisiana law, the Schools did not comply with Sections 2212 and 2212.1 of Title 38 when they sought bids for Internet access service and internal connections.² On appeal, USAC acknowledged that the SLD's interpretation of Sections 2212 and 2212.1 may have been wrong and that such statutes only "may" have required competitive bidding with respect to the Schools' funding requests. USAC, however, claimed for the first time in its denials that the Schools' funding requests should have been denied because the Schools may have violated Section 2237 of Title 38.³ USAC interpreted Louisiana law to mean that any E-rate funding request that fails to meet the dollar thresholds set forth in Sections 2212 and 2212.1, and is therefore *not* subject to competitive bidding under the statutes, is nevertheless "clearly" subject to the bidding requirements of Section 2237.

The AG does not agree with the SLD's and USAC's interpretations. In the attached AG opinion, the AG describes how the Schools' purchases should be analyzed for purposes of determining the applicability of Title 38. The threshold question in the analysis is whether the proposed procurement is for public works, or for the purchase of materials and supplies, or for the procurement of services.⁴ Depending upon the answer to this threshold question, the AG opinion sets forth the following governing principles for the Title 38 analysis:

1. If services are being procured, Title 38 does not apply. The AG clarified in its opinion that contracts for services are not subject to the procurement requirements set forth in Title 38.⁵

² LA RS §§ 38:2212 and 38:2212.1.

³ *Id.* § 38:2237.

⁴ AG Opinion at 3-4.

⁵ *Id.* at 3.

2. If the procurement is for “public works” (*i.e.*, the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity), Section 2212 of Title 38 applies only if the purchase is \$100,000 or more. For public works that involve telecommunications and data systems of \$100,000 or more, the applicant may use either the general bid requirements of Section 2212 or the RFP requirements set forth in Section 2237.⁶
3. If “materials and supplies” are being procured, Section 2212.1 of Title 38 applies only if the purchase is \$7500 or more. Specifically, contracts for materials and supplies valued between \$7500 and \$14,999 must be made by obtaining at least three telephone or faxed price quotations. Contracts for materials and supplies valued at \$15,000 or more must be advertised and entered into with the lowest responsible and responsive bidder.⁷ Materials and supplies also may be purchased off the state bid list. The competitive bidding requirements of Section 2212.1 do not apply to such purchases, even if the value of the materials and supplies exceed the thresholds established by Section 2212.1.⁸
4. Contracts for telecommunications and data processing systems that meet the thresholds for public works or materials and supplies under Sections 2212 and 2212.1 may be bid under either the general competitive bidding requirements set forth in those sections or through a specific request for proposal (“RFP”) under Section 2237.⁹ Contracts for telecommunications and data processing systems do not need to be bid if they do not exceed the thresholds set forth in Sections 2212 and 2212.1.
5. To the extent Title 38 is found to apply to E-rate purchases by the Schools based upon the foregoing principles, the AG indicated USAC’s competitive bidding process appears to assure a competitive bid process.¹⁰

Attachment C hereto applies this framework to analyze whether or not each School’s purchases of Internet access service and/or internal connections were subject to Title 38 as

⁶ *Id.* at 2-3; LA RS § 38:2212.

⁷ AG Opinion at 3; LA RS § 38:2212.1. Please note that this summary reflects the threshold amounts under Section 2212.1 at the time the Schools sought bids for Internet access services and internal connections. These threshold amounts, however, were later amended by the state to \$10,000 and \$20,000, respectively. The AG opinion (and USAC’s denials) reflects the revised amounts, even though they were not yet effective when the Schools sought bids.

⁸ AG Opinion at 4-5.

⁹ AG Opinion at 3; LA RS § 38:2237.

¹⁰ AG Opinion at 4.

USAC alleged. Based upon the AG's interpretation of state procurement law, the most salient points of the analysis are as follows:

- Sections 2212, 2212.1 and 2237 of Title 38 do not apply to Internet access or maintenance services because these statutes apply to public works or the purchase of materials and supplies, including such purchases relating to telecommunications and data processing systems. As the AG explained, Internet access and maintenance services are service contracts and thus are not subject to Title 38.
- Some of the internal connections contracts (*e.g.*, the installation of CAT 5 Drops, network wiring, fiber optics) are "public works" because they improve a public facility. However, since each of the Schools' public works contracts are less than \$100,000, Title 38 does not apply.
- Some of the internal connections contracts (*e.g.*, power supplies, switches, hubs, servers) are for "materials and supplies." Many of these contracts are less than \$7500 and thus do not trigger Title 38.¹¹ Those contracts that exceed \$7500 would trigger the competitive bidding requirements of Title 38. Such competitive bidding requirements could be satisfied by using the general procurement guidelines set forth in Section 2212.1 or, if the materials and supplies related to telecommunications and data services, using the RFP process of Section 2237 or, as the AG opined, "the posting of the bid proposal on the USAC website would certainly appear to be an acceptable process that would assure a competitive bid process" under Title 38.¹² Furthermore, materials and supplies purchased off a state bid list are not subject to competitive bidding under Title 38.

Accordingly, in each case detailed in Attachment C, the Schools' procurement of Internet access services and internal connections complied with state procurement law.

The SLD's initial denials were based solely on perceived violations of Title 38, and did not challenge the validity of the Schools' funding requests on the basis of failing to meet the Commission's competitive bidding requirements. Accordingly, the Schools' appeals of the

¹¹ In its decisions, USAC stated that that when multiple contracts for one applicant fall under the dollar thresholds set forth Section 2212.1 it would, in its own discretion when interpreting of Title 38, determine whether the contracts should be construed as a single contract. *See Administrator's Decisions on Appeal, Further Explanation of the Administrator's Decision on Appeal* at p. 5 n.8 (copies, which are substantially identical, are attached to each Request). The AG's opinion makes clear that each contract should be individually analyzed for purposes of applying Title 38, noting that "each procurement must be individually evaluated to determine if the Public Bid Law applies and if so, whether the contract is for a public works project or is for the purchase of materials and supplies." AG Opinion at 4.

¹² AG Opinion at 4.

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SLD's decisions understandably addressed only the alleged Title 38 violations. In upholding the SLD's decisions, USAC inexplicably asserted: "Your appeal did not indicate that the FCC's competitive bidding requirements were met and is therefore denied."¹³ The Schools fully complied with all state and federal competitive bidding requirements. There was no need for the Schools' to defend their compliance with the FCC's competitive bidding requirements because the SLD never raised this as an issue. The Requests address the Schools' compliance with the FCC's competitive bidding requirements.

The Schools urge the Commission to rule on their Requests expeditiously now that it has the benefit of the AG's opinion regarding how Title 38 is to be applied to the Schools' purchases of Internet access services and internal connections through the E-rate Program.

Sincerely,

/s/ Kenneth F. Sills

Kenneth F. Sills

Attachments

cc: Jennifer Schneider (FCC - Wireline Competition Bureau)
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¹³ See *Administrator's Decisions on Appeal* at p.2 (copies, which are substantially identical, are attached to each Request).